IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

(1) State of Rajasthan Vs. Kunal & Another

D. B. Criminal Death Reference No.1/2006 under Sec.366 Cr.P.C. for confirmation of the judgment dated 12-10-2006 in Sessions Case No.91/2006 passed by Sh. Govind Ram Gupta, RHJS, Special Judge SC/ST (PA Cases) Kota.

(2) Kunal Panchal Vs. State of Rajasthan
(D.B.Criminal Appeal No.1152/2006)

D.B. Criminal Appeal under Sec.374(2) Cr.P.C. against the judgment dated 12-10-2006 in Sessions Case No.91/2006 passed by Sh. Govind Ram Gupta, RHJS, Special Judge SC/ST (PA Cases) Kota.

(3) Banti @ Kuldeep Joshi Vs. State of Rajasthan
(D.B.Criminal Appeal No.1153/2006)

D.B. Criminal Appeal under Sec.374(2) Cr.P.C. against the judgment dated 12-10-2006 in Sessions Case No.91/2006 passed by Sh. Govind Ram Gupta, RHJS, Special Judge SC/ST (PA Cases) Kota.

(4) Banti @ Kuldeep Joshi & Another Vs. State of Rajasthan
(D.B.Criminal Jail Appeal No.1154/2006)

D.B. Criminal Jail Appeal under Sec.374(2) Cr.P.C. against the judgment dated 12-10-2006 in Sessions Case No.91/2006 passed by Sh. Govind Ram Gupta, RHJS, Special Judge SC/ST (PA Cases) Kota.

Date of Judgment: January 10, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE R.S.CHAUHAN

Mr. M.L.Goyal, Public Prosecutor for the State of Rajasthan.

Mr. Arvind Kumar Gupta] for the accused.
Mr. Ashvin Garg]
Mrs. Alka Bhatnagar]
Mr. Rinesh Gupta]

BY THE COURT:(PER HON'BLE Shiv Kumar Sharma,J.)

The accused Kunal Panchal and Banti @ Kuldeep Joshi along with Manish @ Kapil were charged and tried under sections 449, 302, 302/34, 380 IPC and Section 4/25 Arms Act before the learned Special Judge SC/ST (PA Cases) Kota who convicted Kunal Panchal and Banti @ Kuldeep for the offences under sections 302/34, 449 IPC and 4/25 Arms Act and having regard to the peculiar facts and circumstances of the case found it to be rarest of rare cases and therefore sentenced them thus:-

Kunal Panchal and Banti @ Kuldeep:

U/s.302/34 IPC:

Sentence of death and fine of Rs.500/- in default to suffer one month imprisonment.

U/s.449 IPC:

To suffer life imprisonment and fine of Rs.500/-, in default to further suffer six months rigorous imprisonment.

Kunal Panchal:

U/s.4/25 Arms Act:

To suffer rigorous imprisonment two years and fine of Rs.500/-, in default to further suffer one month simple imprisonment.

Charge under section 302/34 IPC was however not found established against accused Manish @ Kapil and he stood acquitted.

3. The learned Special Judge SC/ST (Prevention of Atrocities Cases) Kota made a reference (bearing Death Reference No.1/2006) under section 366 Cr.P.C. for confirmation of death sentence. Accused Kunal Panchal and Banti @ Kuldeep preferred appeals challenging their conviction

and sentence as aforesaid.

4. The brief facts as unraveled by the prosecution at the trial are as follows:-

On December 22, 2005 the informant Vinay Jain, husband of Lalita (now deceased), submitted a written report (Ex.P-56) at police station Dadabari Kota, stating therein that in the evening on the said day he was away from his house and his wife Lalita and two daughters Chinna (7 years) and Jhunjhun (2 years) were at the house. Around 8 PM his neighbour Dr.Udai Singh informed him on phone that smoke was spreading from his house. He rushed to the house and found his wife lying in a pool of blood in the bed-room having burns on her legs. All the articles of the house were also scattered. His daughter Divya (Chinna) informed him that Kunal Panchal and one other boy came to the house, caused injuries on her mother with knife and Soolia and after searching almirahs and bolting the door from outside they fled away. Informant further stated that Kunal Pnachal used to work at his shop `Vishnu Property' for the last 5-6 months. On that report a case under sections 449 and 302/34 IPC was registered and investigation commenced. Post mortem on the dead body was performed. Necessary memos were drawn, statement of witnesses were recorded, the accused were arrested and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Special Judge SC/ST (PA Cases) Kota. Charges under sections 449, 302, 302/34 and 380 IPC were framed. The accused denied the charges and claimed trial. The prosecution in support of its case examined as many as 27 witnesses. In the explanation under section 313 Cr.P.C., the accused claimed innocence and examined five witnesses in defence. Learned trial Judge on hearing final submissions disposed of the case as indicated herein above.

5. It is well settled proposition that the graver the offence, the greater should be the care taken to see that neither an innocent person is convicted nor a guilty allowed to escape. Bearing this principle in mind we straightway proceed in accordance with sections 366 and 368 CrPC to examine the entire evidence independently.

6. Death of Lalita was undeniably homicidal in nature. As per postmortem report (Ex.P-1) following ante mortem injuries were found on her dead body:-

1.Incised wound 2 x ½ cm x skin deep on just above lt. eye brown
2. Incised wound 3 x ½ cm x muscle deep just above lt. angle of mouth
3. Incised wound 2 x ¼cm x skin deep just 1cm above Inj.2
4. Incised wound 1 x ¼cm on Lt. cheek.
5. Contusion 4 x 3 cm Lat. side of lt. eye
6. Incised wound 2 x ¼cm x skin deep back of lt. ear
7. Two incised wounds 1x1/4cm x skin deep on lt. ear antly
8. Incised wound 1 x ½cm x skin deep on lt. angle of mandible
9. Abrasion ¼ x ¼ cm just below lt. mandible
10. Incised wound 1½ x ½cm x muscle deep on Rt. cheek 5cm antly to Rt. ear.
11. Incised wound 4 x ½cm x muscle deep on Rt. angle of mandible.
12. Incised wound 1 x ½ cm x skin deep on Rt. side of neck upper 1/3
13. Incised wound 1 x ½ cm x skin deep on Rt. side of neck upper 1/3
14. Incised wound 1 x ¼cm x skin deep on Rt. temporal region
15. Incised wound 3 x ½cm x scalp deep on Rt. temporal region
16. Incised wound (3in no.) 6x1xbone deep on occipital scalp Rt. side
17. Incised wound (2 in no.) 1x1/2cmxskin deep back of neck
18. Punctured wounds ¼ x ¼ on back of chest & abdomen

19 Incised wound 1x1/2 cm x muscle deep on back of lumbar region
20. Incised wound 2x ¼ cm x skin deep on Lt.side of abdomen.
21. Incised wound 1 x ¼cm x skin deep front of neck
22. Incised wounds (3 in no.) 3 x ¼cm x muscle deep on lt. clavicle
23. Incised wound 2 x ¼ cm x skin deep just above Rt. clavicle
24. Incised wound 1x ¼cm x skin deep on Rt. Clavicle
25. Incised wound 1 x ½ cm x muscle deep on Rt. Pectoral region
26. Multiple punctured wounds (15 in no.) ¼ x ¼ on front of chest and abdomen.
27. Stab incised wound 2 x ½ cm x ?deep on Epigestrium
28. Incised wound 2 x ½ cm x skin deep on Rt. Hypochondrium
29. Incised wound 1 x ¼cm x skin deep on Rt.arm on 1/3 medially.
30. Incised wound 1 x ¼ cm x skin deep on Rt. forearm 1/3 antly.
31. Incised wound (2 in no.) ½ x ¼ cm x skin deep on Rt. thumb antly
32. Incised wound (3in no.) 1 x ¼ cm x muscle deep on Rt. arm posterly
33. Incised wound (3 in no.) 1 x ¼ x skin deep Rt. forearm posterly.
34. Incised wound 1 x ½ cm x muscle deep Rt. thigh on 1/3 latly.
35. Abrasion 1 x ¼ cm on Rt. knee cap
36. Abrasion ¼ x ¼ cm on Rt. Thigh on 1/3 antly.
37. Incised wounds (2 in no.) 1 x ¼ x skin deep Lt. shoulder.
38. Incised wound 1 x ¼ cm x skin deep on Lt. arm 1/3 postly
39. Incised wound (2 in no.) 1 x ½ cm x muscle deep Lt. forearm postly
40. Two incised wounds 1 x ½ cm. muscle deep on Lt. wrist postly
41. 3 Incised wounds 1 x1/2 cm x skin deep on Lt. thigh latly.
42. Incised wound 1 x ¼ cm x muscle deep Lt. leg 1/3 latly.
43. Superficial to deep burns on both foot, sole ankles lower part of Rt. leg, back of lt. leg and back of lt. thigh, toes of Rt. & Lt. foot completely chared, peeling of skin at places and redness at places ante mortem burn.
44. Stab wound 2 x ½cm x cavity deep just below lt. clavicle

45. Stab wound 2 x ½ cm x cavity deep on Rt. pectoral region
46. Stab wound 3 x ½ cm x cavity deep on Rt. hypochondrium.

Dr. Ashok Mundra (Pw.1) who conducted autopsy as a member of Medical Board deposed that the cause of death was shock as a result of injuries to both lungs and liver with cumulative effect of multiple injuries & burns.

7. Dr.Udai Singh Jatav (Pw.10) in his deposition stated that on December 22, 2005 while he was treating patients, Divya daughter of Vinay Jain came and informed him that Kunal, a servant of the shop of his father, killed her mother and set her ablaze. He then accompanied Divya to her house and found mother of Divya lying dead in a pool of blood in the bed-room and her legs were burnt. He then communicated the information over phone to Vinay Jain as well as to the Police.

8. Divya (Pw.25), a female child of 6 years was examined after due care and caution by the trial court. She stated that Kunal killed her mother with knife and the other companion of Kunal whom she identified as Kuldeep, killed her mother with Soolia. She further stated that while the accused were causing injuries to her mother, she proceeded to bathroom.

9. Jodhraj (Pw.13) deposed that he owned a shop of electric parts in Sector 7 Keshavpura. On December 22, 2005 around 6 PM Banti came to his shop and demanded Tochia (Soolia) for making hole in the board. He then handed over Soolia to Banti.

10. Abdul Khalid (Pw.3) in his deposition stated that he used to run the shop of crackers. On different dates in the months of October and November 2005 Manish and Kunal Panchal had purchased crackers from him in consideration of Rs.7300/-. They however did not pay cash and

promised to make payment afterwards but they failed to fulfill their promise.

11. Rakesh Kumar Gupta (Pw.5) deposed that in his presence blood stained knife and jacket got recovered at the instance of Kunal Panchal. Recovery memos (Ex.P-38) and (Ex.P-39) were drawn on which he put his signatures.

12. Kamal Kishore Puri, Malkhana Incharge (Pw.6) stated that he kept the recovered articles intact in Malkhana and the same were sent by him to the FSL. Gopal Chand, Constable (Pw.7) carried the articles to FSL.

13. Devlata Varun (Pw.11) neighbour of deceased, stated that on the day of incident around 7.45 PM while she was going to Subhash Circle she heard voice of Divya who was making request from her house to open the door. After opening the door she went to circle and when she returned after purchasing articles she saw a crowd at the house of Lalita. On making inquiry she came to know that Lalita was murdered.

14. Vishnu Sharma (Pw.17), a property-dealer, owned a shop near Rambari Petrol pump. He deposed that Kunal used to work as peon at his shop as well as shop of Vinay Jain. Some 4-5 days prior to the incident Kunal was not coming to the shops on the pretext that he was suffering from fever. He further deposed that Kunal demanded sum of Rs.10,000/- from him as he wanted to repay the loan.

15. Informant Vinay Jain (Pw.23) in his deposition stated that his wife Lalita was murdered on December 22, 2005. At the time of incident he was not at his house. Around 8 PM Dr. Udai Singh Yadav informed him on

telephone that there was smoke in his house. Within ten minutes he reached to the house and found his wife Lalita lying in a pool of blood on the floor of the bedroom. Her legs were burnt and she sustained 40-50 injuries on her person. Dr.Udai Singh Yadav also came over there and declared her dead. All the articles of the room were scattered. On being enquired Divya informed him that Kunal and one other boy wearing red jacket came to the house. After Lalita served water to them, Kunal demanded money and when she declined Kunal pushed her and inflicted on her person injuries with knife, the other boy also gave injuries to her. She (Divya) was pushed in the bathroom, from where she saw her mother got burnt by them. They left the house after bolting it from outside.

16. Bhagwat Singh Hingar, SHO (Pw.27) deposed that on December 22, 2005 at 8.30 PM Vinay Jain submitted written report on which he made endorsement and commenced investigation. He went to the house of Vinay Jain where dead body of Lalita was found lying on the floor of bedroom in the pool of blood and clothes on legs had flames of fire. He then put out the fire. The articles of the house were scattered and the tube of gas-cylinder was found removed. He arrested Kunal and Banti and on the basis of disclosure statement of Banti @ Kuldeep he got recovered Soolia vide memo (Ex.P-63) and Jarkin stained with blood vide memo (Ex.P-64). Kunal was arrested on January 28, 2006 and at his instance knife and blood stained Jeans got recovered vide memos Ex.P-38 and Ex.P-39.

17. Assailing the impugned findings learned learned counsel for the accused Kunal Panchal canvassed as under:-

(i) Divya (Pw.25) a child witness was tutored and made

improvements on material points in her testimony. From her statement it is clear that she was not in a position to see the occurrence. She admitted that while beating was given to her mother, she was in the bathroom.

(ii) Recovery of knife and jeans at the instance of Kunal Panchal was farce and no reliance could be placed on it.

(iii) The evidence of motbirs of recovery has not been appreciated by the learned trial judge properly.

(iv) The evidence of Dr.Udai Singh Yadav (Pw.10), Devlata varun (Pw.11) and Bhagwat Singh Hinger IO (Pw.27) has not been considered in right perspective.

(v) The prosecution story is not probable since there was no motive behind the occurrence.

18. Learned counsel for the accused Banti @ Kuldeep contended as under:-

(i) Banti was not named in the FIR. Therefore test identification parade ought to have been held. Failure to hold test identification parade is fatal to the prosecution case.

(ii) Although Divya (Pw.25) identified Banti for the first time in court, such identification has got no evidentiary value.

(iii) There is always the danger in accepting the evidence of a child because she might have been coached to give out a version by persons who may have influence on her. It is well settled that although legally there is no bar to accept the uncorroborated testimony of a child witness yet prudence requires that courts should not act on the uncorroborated

evidence of a child witness sworn or unsworn.

(iv) From the evidence available on record it cannot reasonably be inferred that Kuldeep @ Banti was involved in the murder of deceased, the reasons are:-

(a) Name of Kuldeep @ Banti did not find place in the FIR;

(b) No Identification Parade was conducted by the police;

(c) Divya (Pw.25) although informed Dr.Udai Singh Yadav (Pw.10) that Kunal had committed murder of her mother, she did not name Banti @ Kuldeep;

(v) There was no motive on the part of Kuldeep @ Banti to kill the deceased.

(vi) Recovery of Soolia at the instance of Kuldeep @ Banti is highly doubtful.

(vii) Statement of Jodhraj (Pw.13) that the accused took Soolia from him, does not connect Banti @ Kuldeep with the crime. Since Soolia was not produced before the court, recovery of Soolia had no evidentiary value and it could only be conclusive circumstance to connect Banti @ Kuldeep with the commission of crime.

(viii) No doubt as per FSL report (Ex.P-68) human blood was found on Soolia and Jerkin but from the mere production of human blood stained article by accused, one cannot come to the conclusion that accused committed murder.

(ix) As per the testimony of Dr.Ashok Kumar (Pw.1) only injuries No.26 and 18 could be caused by Soolia. The said injuries were not sufficient in the ordinary course of nature to

cause death.

(x) Learned trial Judge failed to observe following general rules:-

(a) That the onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor;

(b) That the evidence must be such as to exclude, to a moral certainty every reasonable doubt of the guilt of the accused.

(c) That in the matters of doubt it is safer to acquit than to condemn, since it is better that several guilty persons should escape than that one innocent person should suffer.

(d) That there must be clear and unequivocal proof of the corpus delicit (substance of the offence).

(e) That the hypothesis of the delinquency should be consistent with all the facts proved.

(f) That evidence of both sides is more or less equally balanced and that being the position the benefit of doubt must go to the accused.

(g) That in criminal cases, the prosecution is under an obligation to prove the case beyond reasonable doubt and if there is any doubt, the benefit must go to the accused.

(h) That the prosecution story may be true, but between may be true and must be true, there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and

unimpeachable evidence before an accused can be convicted.

(i) That in criminal cases, mere suspicion however, cannot take the place of proof.

(j) That in criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion.

19. Per contra, learned Public Prosecutor supported the impugned judgment and urged that the arguments advanced on behalf of the accused did not have any merit. He drew our attention to the suggestion given by learned counsel for the accused to Divya (Pw.25) which reads as under:-

> "कुणाल व एक और इसके साथ आया तब उनको सोफे पर बैठाया था। जब मम्मी पानी पिला रही थी तब मैं मम्मी के पास खडी थी। यह गलत है कि यह दोनों अंकल आये जो पानी पीकर चले गये हों। यह गलत है कि मम्मी ने पानी पिलाया उस समय मैं बाहर चली गई होउं।"

It is contended by learned Public Prosecutor that both the accused admitted to have gone to the house of the deceased that is why suggestion was given in the cross examination that although they went to the house but after taking water they went back. Reliance is placed on Sheshanna Bhumanna Yadav Vs. State of Maharashtra (AIR 1970 SC 1330), wherein it was observed as under:-

(Para 16)

> "... The High Court found that the death of Narendra was not disputed because it was put to Dinkar in cross examination that it was Dinkar alone who killed Narendra."

20. Before dealing with the submissions advanced before us it will be appropriate to advert to the fact situation of the case which may be summarized thus:-

(i) Accused Kunal Panchal was the employee in the shop of husband of the deceased.

(ii) Kunal Panchal and Manish jointly purchased crackers worth Rs.7300/- from Abdul Khalid. They did not pay cash and promised to pay money in near future.

(iii) Kunal Panchal demanded a sum of Rs.10000/- from Vishnu Sharma as Kunal wanted to repay loan.

(iv) Prior to the incident Banti @ Kuldeep got Soolia from Jodhraj on the pretext of making hole in the board.

(v) Divya already knew Kunal but she saw Banti for the first time. According to Divya the accused demanded money from her mother and when she declined she was killed.

(vi) Divya identified Banti in the trial court.

(vii) Statement of Divya gets corroboration from the testimony of Dr.Udai Singh Yadav and Devlata Varun.

(viii) knife and blood stained jeans got recovered at the instance of accused Kunal.

(ix) Soolia and blood stained Jarkin got recovered on the basis of disclosure statement of Banti @ Kuldeep.

(x) Death of Lalita was homicidal in nature.

(xi) In the cross examination of Divya a suggestion was made that although the accused persons came to the house of deceased they went back after drinking water.

(xii) The accused after killing Lalita made attempt to set the dead body and whole house including Divya and Jhunjhunu, ablaze.

21. As earlier noticed the prosecution case mainly rests on the testimony of Divya, who was 6 years of age on the date of incident. It is well settled that the testimony of a child witness should only be accepted after the greatest caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about things which he has not seen and once having been tutored, he goes on repeating in a parrot like manner what he has been tutored to state. Such witnesses are most dangerous witnesses. Learned counsel for the accused, in view of this legal position, urged not to place reliance on the evidence of Divya. We have scanned the testimony of Divya from the point of view of trustworthiness and with great caution. We find evidence of Divya cogent, credible, consistent and trustworthy. Divya knew Kunal and acquainted with him since he was employee of her father and he was a regular visitor of the house. She recognised Kunal and Banti at the trial correctly. Possibility of tutoring is ruled out by the fact that she at the trial addressed accused Kunal as `uncle'. Had she been tutored, she would not have addressed Kunal as uncle and would have named Kunal. She had gone to bathroom of her own and it cannot be said that she had not seen the incident. Her presence at the time of incident was natural. Despite searching cross examination her testimony could not be shattered. Evidence of Divya gets corroboration from the evidence of Dr.Udai Singh Yadav (Pw.10) and Devlata Varun (Pw.11). Thus we do not find any merit in the submissions of learned counsel and we are of the opinion that learned trial judge rightly placed reliance on the evidence of Divya.

22. It is next contended by learned counsel that since Divya did not know Banti prior to the incident, it was incumbent on the investigating officer to conduct test identification parade and failure to hold test identification parade was a serious lapse which is fatal to the prosecution case. Having closely scrutinised the evidence of Divya we notice that at the time of incident she had just not a fleeting glimpse of Banti but she had ample opportunity to watch Banti who remained in her house with Kunal for quite a long time. In such a situation failure to hold a test identification parade would not make inadmissible the evidence of identification in court, as is observed by the Apex Court in Munshi Singh Gautam Vs. State of M.P. (2005)9 SC 631, as under:- (Para 17)

> "It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identify of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. <u>The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially</u>

governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court."

(Emphasis supplied)

23. Their Lordships of the Supreme Court in Abdul Waheed Khan @ Waheed Vs. State of A.P. (2002)7 SCC 175 indicated thus:-

"Identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code of Criminal Procedure,1973 and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond their control and there is some delay, it cannot be said to be fatal to the prosecution."

24. In Dana Yadav alias Dahu Vs. State of Bihar (2002)7 SCC 295, it was held as under:-

> "Identification parade are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable dispatch for the purpose of enabling the witnesses to identify either the properties which are the subject matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits."

25. In Jayawant Dattatraya Suryarao Vs. State of Maharashtra (2001)10 SCC 109, their Lordships of the Supreme Court propounded thus:-

> "Substantive evidence of a witness is his evidence in court. Identification parade is not primarily meant for the court but is meant for investigation purpose. It serves two purposes, namely, to enable the witness to satisfy that the prisoner whom he suspects is rally the one who was seen by him in connection with the commission of the crime and for satisfying the investigation authority that the suspect is the real person whom the witness had seen in connection with the said occurrence. In case when the evidence is cogent, consistent and without any motive, it is no use to theoretically imaging that as the witness has seen the accused for a few minutes it would be difficult for him to identify. It always depends upon one's capacity to recapitulate what he has seen earlier. Power of perception and memorising differs from man to man and also depends upon the situation. Finally, appreciation of such evidence would depend upon the strength and trustworthiness of witnesses."

26. Principles that may be deduced from the afore quoted pronouncements may be summarised thus:-

(i) Identification tests do not constitute substantive evidence. They can only be used as corroborative of the statement in court. Failure to hold test identification parade would not make inadmissible the evidence of identification in court.

(ii) The main object of holding an identification parade during the investigation stage is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witnesses of the crime.

(iii) In order to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade and it is desirable that a test identification parade should be conducted as soon as after the arrest of the accused.

(iv) Appreciation of such evidence would depend upon the strength and trustworthiness of witnesses.

27. In the backdrop of afore quoted legal position we hold that identification of Banti @ Kuldeep by Divya is a substantive evidence and failure to hold test identification parade would not make inadmissible the evidence of identification adduced in the trial.

28. Learned counsel further contended that the prosecution has miserably failed to establish motive for the alleged crime. We have examined the material on record from this angle also. In a criminal trial failure to prove a motive does not necessarily mean that there was no motive for the crime. The circumstances of an act being apparently motiveless is not

a ground from which the existence of a powerful or irresistible influence or homicidal tendency can be inferred. Motives exists unknown and innumerable which might prompt the act. Mysterious in the working of human mind. It is, indeed, a fact that motive underlies at worst every offence, but the motive of men are often deep, unfathomable and their number is ligion. The motive behind a crime is a relevant fact of which evidence can be given. In the instant case accused Kunal Panchal needed money to repay the loan therefore he along with Banti @ Kuldeep went to the house of his employer knocked the door of the house. Since he was a known person and regular visitor of the house, he was given entry in the house. He and his companion were welcomed and drinking water was provided to them. But when their demand of money was not fulfilled they lost their self control and mercilessly inflicted 40-50 injuries with knife and Soolia on the person of Lalita. At that time Divya, an innocent and helpless child of six years and her younger sister Jhunjhunu aged 2 years, were there in the house. The accused set the deceased ablazed and bolted the house of the deceased from outside after removing the gas pipe in making attempt to kill female children present in the house. The accused made disclosure statements on the basis of which weapons of offence and the clothes stained with human blood got recovered.

29. In the ultimate analysis we find that the accused Kunal Panchal and Banti @ Kuldeep have been rightly convicted by the learned trial Judge.

30. That takes us to the question of sentence. Section 302 IPC beyond stating that the sentence for murder is either death or imprisonment for life, does not elaborate any further on what are the circumstances under

which death sentence or lesser sentence could be imposed. Their Lordships of the Supreme Court in **Bachan Singh Vs. State of Punjab** (AIR 1980 SC 898) while being reluctant to categorise or list all aggravating circumstances, held that sentence of death must be imposed only in `the rarest of rare case'. It is now well settled that in exercising its discretion the court may take into consideration as mitigating, on the basis of which the lesser punishment of imprisonment for life may be imposed:-

> (i) That the offence was committed under the inference of extreme or emotional disturbance;
> (ii) If the accused is young or old, he shall not be sentenced to death;
> (iii) The probability that the accused would not commit communal acts of violence as would constitute a continuing threat to society;
> (iv) The probability that the accused can be reformed and rehabilitated;
> (v) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;
> (vi) That the accused acted under the duress of domination of another persons;
> (vii) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.
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> (Emphasis supplied)

31. In **Shri Bhagwan Vs. State of Rajasthan** (2001 Cr.L.J. 2925) five persons of a family were battered to death without mercy by a young culprit aged about 20 years. Their Lordships of the Supreme Court, commuted the death sentence imposed upon the accused into sentence of imprisonment of life and indicated that the accused shall not be released from the prison unless he has served out at least 20 years of imprisonment including the period already undergone by him.

32. In **Reddy Sampath Kumar Vs. State of AP** (2005)7 SCC 603, a greedy son-in-law with the intention of grabbing the property of his father-in-law, committed the death of his father-in-law, mother-in-law and their three minor children. Hon'ble Supreme Court directed that the ends of justice would warrant that the appellant should be in jail in terms of section 57 of the Penal Code and shall not get the benefit of any remission either granted by the state or by the Government of India on any auspicious occasion.

33. In the instant case as already noticed, both the accused came together armed with knife and Soolia to the house of Lalita knowing fully well that she and her two female children were alone in the house. Lalita allowed them to enter the house since Kunal was peon in her husband's shop. The accused were treated by Lalita cordially and she offered drinking water to them but they mercilessly inflicted 46 blows on her person with knife and Soolia and even after killing her they removed the gas pipe and made attempt to set the dead body and the whole house including two female children, ablaze. This act of unparalleled evil and barbarity of Kunal and Banti @ Kuldeep can not be looked with equanimity. The crime committed by them tends to destroy one's faith in all that is good in life. But looking to the young age of Kunal and Banti @ Kuldeep we do not think that this case is to be one of the rarest of rare cases warranting death sentence. Hence, even though we commute the death penalty, yet we are of the view that the punishment should have deterrent effect as well as no further chance to the accused for relapsing into the crime and becoming danger to the society. Placing reliance on the ratio indicated in **Shri Bhagwan Vs. state of Rajasthan** (supra) we uphold the conviction of Kunal and Banti @ Kuldeep

under section 302/34 IPC but commute the death sentence imposed upon them and direct that they shall undergo the sentence of imprisonment of life. We further direct that accused Kunal and Banti @ Kuldeep shall not be released from the prison unless each of them served out at least 20 (twenty) years of imprisonment including the period already undergone by them. They shall not get the benefit of any remission either granted by the State or by the Government of India on any auspicious occasion. We also confirm their conviction under sections 449 IPC and 4/25 Arms Act and the sentence so awarded by the learned trial judge. The reference is answered accordingly. The appeals filed by accused Kunal and Banti @ Kuldeep stand disposed of as indicated above.

(R.S.Chauhan),J. (Shiv Kumar Sharma)J.

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